United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1708 B P/S

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID DeMATTEIS,

Plaintiff-Appellant

vs.

EASTMAN KODAK COMPANY,

Defendant-Appellee

BRIEF OF PLAINTIFF-APPELLANT ON APPEAL

CIVIL NO. 1973-478
DOCKET NO. 74-1708

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Cont'd

Table of Authorties Cont'd

Page

OTHER AUTHORITIES

STATUTES AND CONSTITUTIONAL PROVISIONS

OPINION BELOW

The findings of fact and conclusions of law and order of the District Court for the Western District of New York per Judge Harold P. Burke, presiding, is set forth in the Appendix at pages 36-40 [hereinafter abbreviated as App.]. The District Court in its inimitable fashion in civil cases dismissed Plaintiff's Complaint in its entirety. The Plaintiff brought civil suit in Federal District Court on grounds of reverse discrimination pursuant to Title VII of the Civil Rights Act, 42 U.S.C. §1981 and 42 U.S.C. §1983. The District Court held that Plaintiff did not timely file civil suit pursuant to 42 U.S.C. §2000 (e)-5 (f) (1). The District Court also held that Plaintiff failed to allege facts constituting state action within 42 U.S.C. §1983. Finally, the District Court held that Plaintiff as a white person may not sue under 42 U.S.C. §1981.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S TITLE VII SUIT AS UNTIMELY FILED.

II. WHETHER PLAINTIFF, AS A WHITE CITIZEN OF THE UNITED STATES, HAS STANDING TO BRING AN ACTION PURSUANT TO 42 U.S.C. §1981.

III. WHETHER PLAINTIFF TIMELY FILED SUIT PURSUANT TO 42 U.S.C. §1981.

IV. WHETHER PLAINTIFF CAN PROPERLY BRING AN ACTION AGAINST DEFENDANT PURSUANT TO 42 U.S.C. §1983.

INTRODUCTION

This present case on appeal presents several novel and important issues. The first issue is the precise period of time when the statutory period of ninety (90) days for the filing of Civil Title VII suit in Federal Court begins to run. The second issue is whether a white person has standing under 42 U.S.C. §1981. The third novel issue involves the statute

of limitations applicable to a 42 U.S.C. §1981 civil rights action.

STATEMENT OF FACTS

The Plaintiff brought a civil action in Federal District Court solely on his own behalf based on employment discrimination in violation of Civil Rights statutes, 42 U.S.C. §§ 1981 and 1983 and also in violation of Title VII of the Civil Rights Act. The District Court in predictable fashion, per the Honorable Harold P. Burke, dismissed Plaintiff's Complaint in its entirety in a decision containing "findings that are nothing but cold rhetoric, couched an extraordinarily broad and general terms, and stripped of underlying analysis or justification or an accompanying memorandum or opinion shedding some light on the reasoning employed..." Russo v. Central School District No. 1, 469 F. 2d 623, 628 (2d Cir. 1972). Furthermore, this statement of the facts and discussion of the applicable

law should be prefaced by the proposition, that for the purposes of a Motion to Dismiss, as was before the District Court, and is on appeal before this Court, the allegations of facts in the Comolaint are deemed as admitted. Walker Process Equipment v. Food Machine and Chemical Corp., 382 U.S. 172 (1965); A.T. Products & Co. v. Perlo, 375 F. 2d 393 (2d Cir. 1967). Moreover, a Complaint is not to be dismissed at the pleading stage unless "unless it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." See, Jenkins v. McKeithen, 395 U.S. at 423-24 (1969); Escalera v. New York City Housing Authority, 425 F. 2d 853, 857 (2d Cir. 1967).

The Plaintiff, David DeMatteis, is a caucasian male, who was 63 years of age at the commencement of this action. Mr. DeMatteis was hired by Eastman Kodak Company on or about July, 1941. He worked continuously for Defendant company until November, 1972, a period of over 30 years, (App. 1-2). In November 1971, Mr. DeMatteis was "forced", as alleged in his Complaint into premature retirement because of discriminatory acts

of the Defendant. This forced early retirement falls within the parameters of a "constructive discharge."

The discriminatory acts of the Defendant were engendered by Mr. DeMatteis' sale of his home to a black person. On or about January 12, 1965, while an employee at Kodak, Mr. DeMatteis sold his home in Rochester to black employee of the Defendant Company. Mr. DeMatteis' home was located in an all-white neighborhood which was composed primarily of Kodak employees (App. 2). The discriminatory acts against Mr. DeMatteis by the Defendant are alleged with particularity in the Complaint (See App. 3-9). The essence of Plaintiff's claim is that, as the result of the sale of the home to a black, Plaintiff thereafter suffered discriminatory acts and harassment and unequal treatment in his employment with Defendant which forced him into premature retirement. In outline form, these discriminatory acts included the denying of medical treatment and facilities to Mr. DeMatteis, the denying to Plaintiff the necessary equipment and supplies for the performance of his work, thereby resulting in

unfair evaluations, the refusing to take disciplinary actions against co-workers and supervisors who called him obscene names and constantly harassed him, the rendering of unfair and arbitrary evaluations of Plaintiff's job performance and attitude, and the compelling of Plaintiff to return to work contrary to his physical and mental well-being. As a result of these discriminatory actions by Defendant, Plaintiff's physical and mental well-being deteriorated, certain pre-existing illnesses were exacerbated and finally, Plaintiff contracted additional debilitating physical conditions, thus causing his early retirement and constructive discharge. Furthermore, as stressed above, these facts and actions must be taken as true for purposes of the appeal before this Court. The actual proof and resolution of these facts and legal issues, as well as the requisite cause and connections between them must be left for trial and is not before this Court.

On February 26, 1972, the Plaintiff, David DeMatteis, filed a charge of discrimination against the Defendant Company with the Equal Employment Opportunity Commission [hereinafter EEOC]. On March 26, 1972, Mr. DeMatteis also filed a charge of discrimination against Defendant with New York State Division of Human Rights but thereafter withdrew his charge of discrimination with the New York State Division of Human Rights on or about April 1972 when the EEOC agreed to investigate the matter. The EEOC conducted an investigation of Plaintiff's Complaint and by letter entitled "determination", which was dated May 7, 1973, over one year and two months later, the EEOC informed Plaintiff that his charge was dismissed. (App. 24-30-Defendant's Exhibit "B"). By letter dated May 8, 1973, the District Director of the EEOC notified Respondent Eastman Kodak Company that charges were dismissed. (App. 23-Defendant's Exhibit "A"). Thereafter, in July 1973 upon request of Plaintiff's legal counsel, who had been retained during this interim period, the District Office of the EEOC sent a "Notice-of-Right-to-Sue" letter to

Mr. DeMatteis with copies to his legal counsel and to the Defendant Eastman Kodak Company. Although both the May 9th letter to the Defendant and the May 7th "determination" make reference of a notice to the Plaintiff of this determination of a statutory right to institute a civil action, the District Office of the EEOC, did not send this "Notice-of-Right-To-Sue" until July 1973 when requested by the Plaintiff's legal counsel pursuant to 29 CFR §§ 1601.25 b(c) and 1601.25 b(d). Thereafter, Plaintiff filed a civil action in Federal Court in the Western District of New York on or about October 3, 1973 well within 90 days after receipt of the "Notice-of-Right-To-Sue". In his action, Mr. DeMatteis seeks declaratory relief damages for physical and mental suffering, lost wages and back pay and punitive damages against the Defendant.

Defendant moved to dismiss the Complaint on several grounds. By Order dated April 19, 1974, Judge Harold P. Burke dismissed Plaintiff's Complaint in its entirety on several grounds: including that Plaintiff's

Title VII suit was not timely filed, that Plaintiff's Complaint did not allege facts constituting state action and that Plaintiff is a white person and lacks standing under 42 U.S.C. §1981. The Plaintiff thereafter appealed this dismissal of his Complaint and this appeal is now pending before this Court.

I

PLAINTIFF TIMELY FILED A CIVIL SUIT IN FEDERAL DISTRICT COURT PURSUANT TO TITLE VII OF THE CIVIL RIGHTS ACT.

The final prerequisite in maintaining a civil action in Federal Court pursuant to Title VII of the Civil Rights Act, 42 U.S.C. Section 2000 (e) is the receipt by an aggrieved party of notification from the EEOC. Furthermore, notice by the EEOC is jurisdictional to the filing of a civil suit, see Stebbins v. Continental Insurance Co., 442 F. 2d

843 (D.C. Cir. 1971). The aggrieved party may then pursue a civil action in Federal Court. Private individuals may initiate a civil action in Federal Court under the 1972 Amendments to Title VII (A) where the EEOC has dismissed the charges, or (B) when 180 days have elapsed from the filing of the charge without the EEOC or the Attorney General having filed a Complaint or without the EEOC having entered into a conciliation agreement with the person aggrieved.

The precise question before this Court on appeal is whether the Title VII statutory limitations period of 90 days runs from receipt of the EEOC's determination of lack of reasonable cause or the receipt of the "Notice of Right To Sue" letter. The District Court held that the 90 days runs from the receipt of the EEOC's determination that reasonable cause did not exist and not from Plaintiff's receipt of the "Notice of Right To Sue" letter. The

opinion of the District Court in the instant case, however, conflicts with regulations promulgated by the EEOC and by court decisions that have directly or indirectly considered this issue.

42 U.S.C. §2000 (e)-5 (f) (1) provides in pertinent part:

> "If a charge filed with the Commission... is dismissed by the Commission, or is within 180 days from the filing of such charge...the Commission has not filed a civil action under this section... or the Commission has not entered into a conciliation agreement to which the person aggrieved as a party, the Commission...shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved..."

As is evident from the face of this statute, it is not a model of precision and clarity. As a result of this statutory imprecision and lack of clarity, and in the furtherance of administrative efficiency and action, the EEOC has promulgated regulations relating to the giving of the required statutory

notice. This notification to an aggrieved party is by regulation defined as "Notice of Right To Sue" see 29 CFR §§ 1601.25 b(d) and 1601.26 c(d). Furthermore, 29 CFR §1601.25 b(d), provides that "at any time after the expiration of 180 days from the date of filing of a charge or upon dismissal of a charge at any stage of the proceeding, an aggrieved person may demand in writing that a notice be issued promptly To §1601.25 and the commission shall promptly issue a notice..." (emphasis added) Thus, a "Notice of Right To Sue" is not issued until an aggrieved person demands in writing his jurisdictional "Notice of Right To Sue." The time limitation of 90 days then clearly runs from the receipt of this "Notice of Right To Sue", because it is the notice contemplated by statute as implemented by EEOC regulations.

The District of Columbia Circuit Court of Appeals considered the effect of a similar regulation under Title VII which was enacted prior to the 1972 amendments and held in Stebbins v.

Continental Insurance Co., 442 F. 2d at 846 that "the regulation is therefore within the power of the EEOC to supplement the statutory scheme and in accord with congressional intent." At least two court decisions have indicated that the EEOC's process is bifurcated and that the 90 days runs from the "Notice of Right To Sue" letter. In Stebbins, supra, the District of Columbia Circuit Court of Appeals affirmed a dismissal of jurisdiction where a Title VII suit was commenced before EEOC had issued any notice at all. The court stated "this notification is commonly referred to as the 'Notice of Right To Sue' Stebbins, supra, 442 U.S. at 845. Furthermore, the court went on to state and to hold that "We therefore agree with this prevailing view that, in the absence of special circumstances, the notice of right to sue is a jurisdictional prerequisite to suit." 442 F. 2d at 846. (emphasis added). A recent case in the Southern District of New York also implicitly recognizes that the "Notice of Right To Sue" letter is the requisite statutory notice.

In Smith v. United Press International, 3 (S.D.N.Y. 1974) EPD ¶9512 the court refused to dismiss a suit under Title VII where the prerequisite right to sue letter from the EEOC was not properly issued because of an improper delegation of authority, and held that the EEOC must issue a valid letter within 20 days. The importance of this decision and the quoted Stebbins decision is that both courts recognized that the "Notice of Right To Sue" is a jurisdictional prerequisite to suit in federal court; that is a form letter complying with the statutory requirements as well as the implementing regulations; and that "Notice of Right To Sue" follows a determination of cause by the EEOC. See also EEOC v. U.S. Industries, Inc., 7 EPD ¶9068 (W.D. Tenn. 1974)(court recognizes bifurcated letters and suit is commenced after "Notice of Right To Sue" letter). In the present case the "Notice of Right To Sue" letter was issued upon demand as required by regulation. Plaintiff thereafter commenced civil suit within the 90 day period.

The only case which has considered an issue similar to the precise one before this Court is Beverly v. Lone Star Lead Construction Corp., 437 F. 2d 1136 5th Cir. 1971. This Court also recognized that the EEOC uses a bifurcated approach in sending two letters. The court held that the time limitation period runs from the receipt of the "notice of right to sue". The court stated in pertinent part:

> "On or about June 19, 1967, plaintiff-appellant William J. Beverly applied for a job with the defendant-appellee Lone Star Lead Construction Corp. (Lone Star); he was told by Lone Star that there were no available jobs and that there were 'no applications.' A week later he filed a charge with the EEOC alleging unlawful discrimination in violation of Title VII and that he had been denied employment because he was a Negro. By decision of April 7, 1969, the EEOC found that 'reasonable cause does not exist to believe that the respondent is in violation of Title VII of the Civil Rights Act as alleged.' On May 19, 1969, the commission issued to appellant a 'Notice of Right To Sue Within 30 Days' which stated 'Pursuant to Section 706 (e) of Title VII of the Civil Rights Act of 1964, you are hereby

> notified that you may within thirty (30) days of receipt of this communication institute a civil action in the appropriate Federal District Court.'" Beverly, supra, 437 F. 2d at 1138

The Court held, supra, at 1139, that "Administrative remedies available from the EEOC must be exhausted in a traditional sense of the term as a prerequisite to federal suit." Although the Court in Lone Star was considering the issue of whether a right to sue letter can properly issue after the EEOC makes a finding of no reasonable cause the Court, supra, at 1140 held that administrative remedies were exhausted upon the issuance of the right to sue letter and that the finding of "'no reasonable cause' is not dealt with in a statute." The court thus implicitly held that the time limitation period runs from the receipt of the "Notice of Right To Sue" and that a notice or determination of no reasonable cause is not the notice contemplated by the statute. In the present case, Plaintiff requested such "Notice of Right To Sue" on or about the middle of July. Several days thereafter, Plaintiff received such notice of right to sue and commenced the above action well within

the 90 day period of limitation.

Finally, an examination of the "Notice of Right To Sue" (App. 17 and 35) in relation to the determination of the EEOC (App. (24-30) in the present clearly indicates that the "Notice of Right To Sue" is the required notice contemplated by statute and as required by the implementing regulations quoted above. The "Notice of Right To Sue" letter at the top contains in bold capital letters "Notice of Right To Sue." The right to sue letter also indicates that the charge was dismissed because of a finding of no reasonable cause. Thereafter, the first paragraph informs in bold print:

> "If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from receipt of this Notice; otherwise your right is lost."

The notice of determination on the other hand merely indicates the finding of no reasonable cause by the EEOC and delineates the facts and the reasons for the findings contained therein. This determination

ends with the following paragraph which is obviously a form ending for EEOC findings: "This determination includes the Commission's processing of subject complaint. Should the Charging Party wish to pursue this matter further, he may do so by following the instructions contained in the 3rd paragraph of the accompanying letter." Furthermore, this notice of determination on its face by the above quoted language indicates that it is only a fact finding determination of reasonable cause, or the lack thereof; and is thus not the notice contemplated by statute or regulations. For these reasons, the District Court's determination that the Plaintiff's suit was not timely filed pursuant to Title VII of the Civil Rights Act is erroneous and must be reversed.

II

THE PLAINTIFF, DAVID DeMATTEIS, HAS STANDING TO SUE UNDER 42 U.S.C. §1981.

42 U.S.C. §1981 in pertinent part provides that:

> "All persons within the jurisdiction of the United States shall have the same right...to make and enforce contracts...as enjoyed by white citizens."

The district court, however, in a declarative fashion held that "Plaintiff, a white citizen, may not sue under 42 U.S.C. Section 1981. I decline to follow the district court decision in WRMA Broadcasting Co. v. Hawthorne, 365 F. Supp. 577 (1963)" (App. 40).

Plaintiff alleges in his Complaint that he was discriminated against because as a white he sold his home to a black. Such acts of discrimination are founded upon his race because of his race as a white individual. Furthermore, if Plaintiff had been black and sold his home to another black or to another white, such discrimination would not have taken place. In other words, this discrimination against Plaintiff is not attempting to redress discrimination directed against others, such as blacks he is but attempting

to redress discrimination addressed against him because he is white. Thus, this case on appeal presents the novel issue whether a white individual has standing to sue under 42 U.S.C. §1981.

In 1968, the Supreme Court in Jones v. Alfred H. Mayer Co., 392 U.S. 409 held that 42 U.S.C. §1982, a companion to 42 U.S.C. §1981 prohibited private acts of racial discrimination in the sale of housing. Subsequent to the Supreme Court's decision in Jones each Circuit Court of Appeals which has ruled specifically on the availability of Section 1981 has held that 42 U.S.C. §1981 provides a remedy against racial discrimination in private employment. The Second Circuit Court of Appeals has followed this line of cases, see Williamson v. Bethlehem Steel Corp., 468 F. 2d 1201, 1204 N. 2 (2nd Cir. 1972); see cases collected in Macklin v. Spector Freight Systems, Inc., 478 F. 2d 979 (D.C. Cir. 1973). However, the precise question of whether a white individual may maintain an action and has standing under 42 U.S.C. §1981 in his own behalf has not been answered nor addressed and considered by this Circuit.

Several cases in poorly reasoned decisions have held that a white person can never have standing to sue under 42 U.S.C. §1981 since this section was designed for only the protection of non-whites. See, e.g., Ripp v. Dobbs Houses, Inc., 6 EPD ¶8840 (N.D. Ala. 1973); Perkins v. Banster, 190 F. Supp. 98 (D. Md. 1960). Other Courts have indicated that whites may sue under 42 U.S.C. §1981, but have not given plaintiffs standing because the injury the white plaintiff suffered did not occur because of his race. See, e.g., Agnew v. City of Compton, 239 F. 2d 226 (9th Cir. 1956); Van Hoomissen v. Xerox Corp., 7 EPD ¶9146 (N.D. Cal. 1973). A third line of cases hold that white individuals lack standing under 42 U.S.C.§1981 to assert discrimination to groups to which they do not belong. See, e.g., N.O.W. v. Bank of California, 5 EPD ¶8510 (N.D. Cal. 1973); Waters v. Hublein, Inc., 8 EPD ¶8522 (N.D. Cal. 1974). In the present case Plaintiff is not attempting to redress discrimination to groups to which he does not belong. Furthermore, the Van Hoomissen case is probably incorrect even in light of the restrictive

standing test of Agnew v. City of Compton, 239 F. 2d at 230 where the Court held that section 1981 can only be sued upon when "appellant was deprived of any right which under similar circumstances, would have been accorded a person of a different race." Plaintiff's contention before this Court is two-fold. First, Section 1981 by itself and by relevant Supreme Court cases can not be so restrictively interpreted. Second, and in the alternative, Plaintiff fits within the restrictive test of Agnew.

Two leading cases have granted whites liberal standing to bring suits under 42 U.S.C. §1981, see Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D. Mo. 1969); and Gannon v. Action 303 F. Supp. 1240 (E.D. Mo. 1969).

The Circuit Court of Appeals in Action v. Gannon, 450 F. 2d 1227 (8th Cir. 1971) (en banc) affirmed the district court on the ground that a white plaintiff has standing to bring a discrimination action pursuant to 42 U.S.C. §1985 (3). The court declined to determine whether "determine whether it had jurisdiction under the other sections." Action, supra, at 1229. More recently, a federal

district court in WRMA Broadcasting Co., Inc., v. Hawthorne, 365 F. Supp. 577 (M.D. Ala. 1973) also granted a white plaintiff standing to sue under Section 42 U.S.C. §1981. The District's Court's decision in WRMA and the rationale of its decision is probably the more correct view of Section 1981.

> While in the past it might have been thought, as a conceptual matter, that the Thirteenth Amendment granted power to Congress to provide for the civil rights of blacks only, and not whites, this conclusion is not necessary and is not even logical. Congress, pursuant to the Thirteenth Amendment, could not and did not provide in the reconstruction civil rights statutes that the rights of blacks should be the same as the rights of whites. It is reasonable in every respect to assume that Congress, in acting to secure the rights of all persons against racial discrimination, could pass general laws providing that all races shall be treated equally in certain respects. Under such a general statute, it is entirely proper that a white citizen could benefit incidentally from the elimination of badges and incidents of slavery. Obviously most racially-motivated deprivations of civil rights are and always have been aimed at blacks. However, in those rare instances when a white alleges racial discrimination under Section 1981, it is entirely consonant with the purpose of

> Section 1981 that white discriminated against for racial reasons should have standing under Section 1981, and the power of Congress so to provide is a power ancillary to the enabling cause of the Thirteenth Amendment..., Congress by its enactment of Section 1981, intended to abolish racial discrimination and contracting. Courts should not unnecessarily limit the operation of the plan which Congress has devised or limit the effectuation of a congressional purpose.
>
> WRMA Broadcasting Co., v. Hawthorne, supra at 581

The rationale of this case is equally applicable to the present one before this Court on appeal; discrimination is not to be permitted against blacks or whites. Furthermore, to interpret Section 1981 differently would possibly put a gloss by this Court of invidious discrimination in violation of the Fifth and Fourteenth Amendments. Cf. the Dissent in DeFunis v. Odegaard, 94 S. Ct. 1704 (1974) indicating racial quotas and racial discrimination of any kind will not be permitted.

The present case involves a slightly different type of racial discrimination. It does not involve racially-motivated discrimination by blacks against whites, but racially-motivated discrimination by whites against white. Two Supreme

Court cases which considered the companion section to Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. Section 1982 permitted both white and black plaintiffs who suffered discrimination and injury to their own property interests. The Court granted standing to maintain an action because of racial discrimination against the black plaintiffs as blacks and against the white plaintiffs as whites against defendant whites who effected this discrimination, see Jones, supra and Sullivan v. Hunting Park, Inc., 396 U.S. 229 (1969). The Ninth Circuit Court of Appeals in Trafficante v. Metropolitan Life Insurance Co., 446 F. 2d 1158 (9th Cir. 1971) held that when a white person suffers some racially-motivated interference with his property rights he has standing to sue under §1982. The Ninth Circuit permitted suit by white plaintiffs who only suffered general injury, unlike the specific types of injury as in Sullivan and Jones. The Supreme Court in Trafficante affirmed the broad concept of standing permitted by the Ninth Circuit Court of Appeals under the 1968 Civil Rights Act, but reversed ruling on such a broad concept of standing under Section 1982 of the 1866 Civil Rights Act, see Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 at 209, n. 8.

The Plaintiff in the present case is not asking this Court to adopt the broad holding of the Ninth Circuit Court of Appeals in Trafficante to §1981 cases, but rather the more specific direct injury rule as sustained by white plaintiffs in Sullivan and Jones decisions. Furthermore, the Dissent in Sullivan, per the late Mr. Justice Harlan, 396 U.S. at 251-55 did not question the fact that Sullivan, a white individual has standing to redress racial discrimination by another white. The dissent only questions "the majority's failure to provide any guidance as to the legal standards that should govern Sullivan's right to recovery on remand." In other words if both plaintiff and the black co-employee were discriminated in their employment (as there is some evidence) and both plaintiff and his black co-worker brought suit the precise factual situation under Section 1981 would exist as under Section 1982 in Sullivan in the present case before this Court on appeal.

The Supreme Court recently reaffirmed in entirety its position in Sullivan and Jones that whites and blacks may bring suits where both the white and the black plaintiffs have suffered immediate and direct injury as a result of discriminatory actions by white defendants, see Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 437, 1973. Furthermore, the court reaffirmed the interrelationship and combined interaction between Sections 1981 and 1982 of the Civil Rights Act. In the pertinent language Supreme Court held as follows:

> "In light of the historical interrelationship between §1981 and §1982, we see no reason to construe these sections differently when applied...Consequently, our discussion and rejection of Wheaton-Haven's claims that it is exempt from §1982 disposes of the argument that Wheaton-Haven's exemption from §1981. On remand the district court will develop any necessary facts concerning the adoption of the guest policy and will evaluate the claims of the parties free of the misconception that Wheaton-Haven is exempt from §1981, §1982, and §2000 (a)."

It is thus clear that the rationale of reading together Sections 1981 and 1982 of 42 U.S.C. by Sullivan and Jones and now Tillman is applicable to the present case, especially with such strong language as quoted above from Tillman. Plaintiff is bringing this suit because of alleged discrimination against him on the basis that he is a white individual and sold his house to a black individual. The discriminatory actions would not have occurred if he were not white and they were racially motivated because he is white. Finally, Plaintiff has suffered direct injury as a result of this discrimination against him; he is not attempting to assert rights on the behalf of others. The District Court thus erred in its dismissal of Plaintiff's Complaint pursuant to 42 U.S.C. §1981

VII

PLAINTIFF TIMELY COMMENCED
SUIT UNDER 42 U.S.C. §1981
WITHIN 90 DAYS OF RECEIPT
OF NOTICE OF RIGHT TO SUE
UNDER 42 U.S.C. §2000e

In the District Court the Defendant moved to dismiss Plaintiff's claim under Section 42 U.S.C. 1981 on the ground that it was not timely commenced and thus barred by the statute of limitations. (App. 19). The District Court did not pass on this issue, presumably because it dismissed Plaintiff's claim under §1981 on the ground that Plaintiff lacks standing as a white person, thus rendering the statute of limitations question academic. However, since the statute of limitations question was raised and argued in the District Court and is before this Court on appeal, it will be shown that Plaintiff's action under §1981 was timely commenced. Furthermore, the time sequence of occurrences in the above case is clear. Plaintiff was forced into premature retirement on or about November 1971. Plaintiff thereafter timely commenced this action with the EEOC and the state agency, the New York State Division of Human Rights. Plaintiff then withdrew his charge with the New York State Division of Human Rights on or about April of 1972 when the EEOC agreed to investigate Plaintiff's complaint. Thereafter, over one year after filing his charge with the EEOC, the EEOC issued a determination of no reasonable cause on or about May 7, 1973. In the middle of July, 1973, Plaintiff requested a "Notice of Right To Sue", received such a notice several days later and commenced a Title VII action in Federal District Court in the beginning of October, 1973, well within the 90 day limitation period. Together with his Title VII claim Plaintiff joined a 42 U.S.C. §1981 claim and a 42 U.S.C. §1983

claim.

Neither 42 U.S.C. §1981 nor 42 U.S.C. §1983, as well as the other Reconstruction Civil Rights statutes, however, contains statutes of limitations which delineate when an action must be commenced. In situations where Congress has created federal statutory rights and does not provide for a limitation period, courts have uniformly held that the applicable statute of limitations is that which the state would apply if the action had been commenced in state court, see e.g., U. A.W. v. Hoosier Cardinal Corp., 383 U.S. 696 (1966). This principle has also been recognized and applied in actions brought under 42 U.S.C. §1981, see Young v. International Tel & Tel Co., 438 F. 2d 757, 753 (3rd Cir. 1971); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F. 2d 1011, 1017 n. 16 (5th Cir. 1971); Waters v. Wisconsin Steel Works, 427 F. 2d 476, 488 (7th Cir.) cert. denied, 400 U.S. 911 (1970). "What is not settled, however, is which statute of limitations under state law is appropriate for civil rights actions. Decisions appear divided on this question. Some courts have held that the applicable statute of limitations is that for actions based upon specific common law torts. At least one court has suggested that the appropriate statute is that which is applicable to contracts. Others have applied a statute of limitations for liability created by statutes. A fourth group of courts have applied a general statute of limitations." Larson, The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment, 7 Harvard Civil Rights-Civil Liberties Law Review 56, 77 (1972)(citations omitted). Thus, the precise question before this Court is the applicable statute of limitations in 42 U.S.C. §1981 claims.

The Defendant argued in the lower court that the applicable statute of limitations in 42 U.S.C. §1981 claims is the one-year statute of limitations applicable for the filing of an administrative complaint with the New York State Division of Human Rights pursuant to New York Executive Law §297 (5). This contention is clearly incorrect, however, and has been rejected by a circuit court and two district courts.

> "One court has already rejected the application of these limitation periods. In Waters v. Wisconsin Steel Works of Int'l Harvester Co. [427 F. 2d 476 (7th Cir.), cert. denied 400 U.S. 911 (1970)]. The Defendants contended that the 120-day limitation period for filing a charge of discrimination with the Illinois state agency barred plaintiffs' action under section 1981. Rejecting the argument, the Seventh Circuit indicated that state fair employment practices agencies are merely administrative agencies with administrative remedies and administrative sanctions. And that although their decisions may in some instances be subject to judicial review, administrative agencies are not courts in the first instances with the availability of broad remedies and sanctions. In short, the Seventh Circuit held that the applicable statute of limitations for a section 1981 action is not determined by administrative statutes of limitations."
>
> Larson, supra, 7 Harvard Civil Rights-Civil Liberties Law Review at 83.

Furthermore, a District Court in the Second Circuit recently rejected the applicable limitations statute for the filing of an administrative complaint and held that the filing of 42 U.S.C. §1981 claim is the most analogous state statute of limitations for filing court actions, see Smith v. Perkins-Elmer Corp., 8 EPD ¶9544(D. Conn. 1973) (six-year statute of limitations for filing a contract action); see also Lewis v. Bloomsburg Mills, Inc., 8 EPD ¶9527 (D.S.C. 1974) (court applied

six-year contract statute of limitations to 42 U.S.C. §1981 claim). The same rule is precisely applicable. The one-year statute of limitations is for filing administrative complaints in a state agency and not for filing of court actions and thus not applicable to plaintiff's claim under 42 U.S.C. §1981. Finally, it is analogous to the time limitation for filing the federal administrative complaint with the EEOC, see 42 U.S.C. §2000-e-5 (300 days where there is a state agency).

The question then is to determine what is the applicable rule and statute of limitations in the Second Circuit.. In the leading case of Swan v. Board of Higher Education of the City of New York, 319 F. 2d 56 (2nd Cir. 1963) the Court of Appeals held that in 42 U.S.C. §1983 claims the New York limitation for liabilities created by statute was applicable. The Court stated, supra at 70:

> For §48 (2) of the New York Civil Practice Act prescribes a six-year New York statute of limitation for actions "to recover upon a liability created by statute" and plaintiff's cause of action derives from a statute, the Civil Rights Act.

Subsequently in Romer v. Leary, 425 F. 2d 186 (2nd Cir. 1970) the Second Circuit reaffirmed its position in Swan that in Reconstruction Civil Rights cases, the Court will apply the prescribed New York statutes for suits to recover upon a liability created or imposed by statutes. The Court stated, supra, at 187:

> It is now settled by Swan v. Board of Higher Education...that in a suit seeking declaratory and injunctive relief which is based on the Civil Rights Act, 42 U.S.C. §1983, the applicable limitation arising in New York is the three-year limitation now provided for suits "to recover upon a liability... created or imposed by statute but what is now CPLR §214, subdivision 2."

In the seven year interim period between the Swan and Romer

decisions the New York limitations period was modified and shortened for liabilities created and imposed by statutes from six years down to three years.

Although in the present case Plaintiff clearly filed his §1981 claim well within three years, it is not entirely clear that the three-years statute of limitations is applicable in a 42 U.S.C. §1981 claim for the following reasons. New York Civil Practice Law and Rules §214 (2) provides that a three-year statute of limitations is applicable in "an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in Sections 213 and 215..." Thus CPLR Section 214 (2) refers to other sections which might be applicable and preempt the three-year statute of limitations. CPLR Section 213 (2) provides that a six-year statute of limitations is applicable in "an action upon a contractual obligation or liability express or implied..." 42 U.S.C. §1981 creates a right to recover under federal statute, but also refers to rights and liabilities in the nature of contract actions. Thus it is entirely conceivable and even logical that in 42 U.S.C. §1981 actions CPLR §214 (2) refers back and is preempted by the larger time limitation contained in CPLR §213 (2). The Fifth Circuit has so held in Boudreaux v. Baton Rouge Marine Contracting Co., 437 F. 2d 1011, 1017 n. 16 (5th Cir. 1971) and the above cited District Courts in the Smith and Lewis cases, supra, appeared to so hold. This rationale is applicable in the present case, especially where the one state statute of limitations refers to another for a specific type of action. Although this issue is irrelevant to the present case on appeal before this Court, it is important that this Court consider this issue and hold

the proper one applicable for future guidelines.

Assuming solely for the sake of argument that Defendant's contention is correct that a one-year statute of limitations is applicable, the filing of a complaint with the EEOC tolls the statute of limitations on a 42 U.S.C. §1981 action, see Macklin v. Spector Freight Systems, Inc., 478 F. 2d 979, 994-95 n. 30 (D.C. Cir. 1973). But see Johnson v. Railway Express Agency, Inc., 489 F. 2d 525, 531 (6th Cir. 1973), cert. granted 42 U.S.L.W. 3661 (1974), where the Sixth Circuit rejected the tolling effect contention of Macklin. In the present case §1981 was not commenced because of a pending Title VII complaint in the EEOC. Plaintiff was constructively discharged in November 1971 and thereafter filed his initial complaint with the EEOC in February, 1972. The EEOC did not issue a determination until approximately 15 months after the initial complaint was filed. If the statute of limitations were tolled in the present case and the applicable statute of limitations was one year, Plaintiff's commencement of this federal court action would be timely. However, as argued above, the applicable statute of limitation is at minimum three years and most likely six years for 42 U.S.C. §1981 claims for filing in Federal District Court in New York State, thus rendering Plaintiff's claim as timely.

IV

PLAINTIFF HAS STANDING TO MAINTAIN AN ACTION PURSUANT TO 42 U.S.C. §1983

The District Court, in the shortest possible analysis, held "the complaint does not effectively allege facts which constitute state action within the meaning of the Thirteenth and Fourteenth Amendments or 42 U.S.C. Section 1983, Moose Lodge vs. Irvis, 407 U.S. 163." However, Plaintiff has alleged sufficient facts which would raise a prima facie case of "state action" for purposes of an invidious discrimination claim under 42 U.S.C. §1983.

Claims brought pursuant to 42 U.S.C. §1983 which are not brought against clearly or public individual organizations or bodies cause a court "to wade 'into the murky waters of the state action doctrines'" Jackson v. Statler Foundation, 496 F. 2d 623, 626 (2nd Cir. 1974). Furthermore, "whether private conduct which is in some manner aided by the actions of the State, is or is not 'state action' for the purposes of the Fourteenth Amendment is not an easy question. Only by sifting facts and weighing circumstances in the non-obvious involvement of the State in private conduct be attributed its true significance." Jackson, supra, at 627, ; Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972); Perez v. Sugarman, _____ F. 2d___(2nd Cir. June 7, 1974). Moreover "§1983 has served as the vehicle for bringing suit against corporate entities." Perez v. Sugarman, supra, at n. 5; see also Palmer v. Columbia

Gas of Ohio, Inc., 479 F. 2d 152 (6th Cir. 1973); Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972).

Before examining the particular facts in the present case it is necessary to outline the doctrinal evolution of "state action" in the Second Circuit Court of Appeals. The Second Circuit Court of Appeals initially enunciated a restrictive test in Powe v. Miles, 407 F. 2d 73, 81 (2nd Cir. 1968) that "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon the plaintiff but with the activity which caused the injury." The Second Circuit, however, has not only relaxed its early restrictive test, but has also made it more expansive and highly sophisticated. It should be parenthetically noted here that although Judge Friendly ostensibly attempts to rejuvinate the early restrictive test of his decision in Powe, Lopez v. Henry Phipps Plaza South, Inc., ___F. 2d___ (2nd Cir. June 18, 1974), it is clear that the highly-detailed, well-reasoned and sophisticated craftsmanship of Lopez is not only consonant but also doctrinally compatible and consistent with the Second Circuit's present enunciation of state action. Furthermore, it is also evident that the Second Circuit Court of Appeals is internally split and thus in a state of flux on its present position on the state action doctrine, see Jackson v. Statler Foundation, supra; Shirley v. State National Bank of Connecticut, 493 F. 2d 739 (2nd Cir. 1974); Bond v. Dentzer, 494 F. 2d 302 (2nd Cir. 1974). It is Plaintiff's contention, however, that the present case falls within the currently viable articulation of "state action" in the Second Circuit.

In Jackson v. Statler Foundation, supra, at 634 the Second Circuit enunciated the present applicable state action test;

> In sum, we believe that if on remand the district court finds that the defendant[s]...are substantially dependent upon their...[conferred]...status, that the regulatory scheme is both detailed and intrusive, that the scheme carries connotations of government approval, that the... [defendants]...do not have a substantial claim of constitutional protection, and that they serve some public function, then a finding of "state action" would be appropriate. Moreover, even if one of these factors is absent a finding of "state action" may still be appropriate.

Furthermore, the Court indicated that this test, as a particular holding in Jackson, and thus also in the present case, involves "a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims." Jackson, supra, at 629; see also id. at 635 where the court specifically limited this test to racial discrimination claims. Finally, it is Plaintiff's contention that this test is applicable in the present case in conjunction with the public function or company town test of Marsh v. Alabama, 326 U.S. 501 (1946); see also Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); see also Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973); Velez v. Amenta, 370 F. Supp. 1250 (D. Conn. 1974);

Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971); Franceschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972); Washington v. Fox, ___P. 2nd _____(Wash. 1973); State v. Shack, 58 N.J. 297 (1971); People v. Rewald, 65 Misc. 2d 453 (County Ct. 1971).

An analysis of Defendant's status and position clearly mandates a finding that state action exists in the present case. Eastman Kodak Company is a multi-national, and multi-state conglomerate corporation with its omnipresent economic, social, political and physical base in Rochester, New York. Eastman Kodak employs approximately 48,000 individuals in Monroe County, see Democrat and Chronicle, Upstate, September 1, 1974, at p. 4. Eastman Kodak Company has its own union for its personnel (see id.). It has extensive social, cultural, athletic, medical, restaurant and cultural facilities and activities for its personnel. Furthermore, it even has an extensive banking, savings and loan and home mortgage and insurance and other financial systems for its personnel. Eastman Kodak thus pervades,and in a large sense,controls all aspects of its employee's existence. It is as much of a self-sustaining entity and all-pervasive in its presence and influence as the company town in Marsh; the only difference is that it exists in a contemporary urban setting. Furthermore, the regulation of Kodak's structure is highly detailed and intrusive by local, state and federal governments; it is highly

regulated under labor, health and banking laws, but only to list a few. Many of its functions are licensed and are subject to constant scrutiny by public officials. Many of its facilities are open for public examination display. It has enumerable contracts and contacts with all levels and types of governments and their branches, subdivisions and delegate agencies. A list of its public functions is endless. Its interrelationship, including licensing, regulations and otherwise with governmental structures is endless as well. To hold that Eastman Kodak is a private company is to fabricate and to further an untenable legal fiction; it is undoubtedly more in a position of a "state" than a majority of the public bodies and public entities in the United States. Thus, the District Court's holding that Defendants are not subject to the parameters of 42 U.S.C. §1983 is patently erroneous and should be reversed.

CONCLUSION

The Plaintiff-Appellant has attempted to show in what matter the judgment of the District Court is erroneous and should be reversed, and to demonstrate that Plaintiff's Title VII claim was timely filed in Federal District Court, that Plaintiff has standing to

bring suit under 42 U.S.C. §1981 and that he did so in a timely manner, and that Plaintiff may properly bring suit against Defendant pursuant to 42 U.S.C. §1983. The Plaintiff-Appellant respectfully requests this Court to reverse the findings of the District Court and remand for further proceedings.

Respectfully submitted,

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September 4, 1974

A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
United States Court House
Foley Square
New York, New York, 10007

Re: DeMatteis v. Eastman Kodak Company
Civ. No. 1973-478; Docket No. 74-1708

Dear Sir:

Pursuant to Federal Rules of Appellate Procedure 25(a), 30 and 31, I am filing 10 copies of the Appendix on Appeal and 25 copies of the Appellant's Brief on Appeal with this Court.

I also certify that I am sending one copy of said Appendix and two copies of said Brief to Nixon, Hargrave, Devans & Doyle, attorneys for Defendaat-Appellee with a copy of this letter.

Very truly yours,

Joan de R. O'Byrne

JOAN de R. O'BYRNE

JO:lrr

cc. Nixon, Hargrave, Devans & Doyle